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SUBJECT: S. 2176 - Federal Vacancies Reform Act of 1998

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TEXT:

Below is the draft SAP for S. 2176 - Federal Vacancies Reform Act of 1998. The SAP reiterates the position released in the 7/28/98 Bowles letter: Senior Advisers would recommend veto (please call me @5-9136 if you need a copy). The Senate is expected to hold a cloture vote on the motion to proceed to the bill tomorrow morning (Thurs. @9:30am). We aim to get the SAP to the Hill later in the morning. Please provide comments/clearance by 11:00am. Thank you.

DRAFT - NOT FOR RELEASE

September 23, 1998
(Senate)

S. 2176 - Federal Vacancies Reform Act of 1998
(Sen. Thompson (R) TN and 6 cosponsors)

The Administration cannot support S. 2176 as reported by the Senate Governmental Affairs Committee. If the bill is not amended to address the Administration's concerns, the President's senior advisers would recommend that he veto the bill. S. 2176 would revise the process set forth in the Vacancies Act for filling vacancies in positions that are subject to Presidential appointment and Senate confirmation.

Making the Vacancies Act the exclusive governing statute for appointing acting officers, as S. 2176 does, would largely address the concerns that Senators have raised. S. 2176, however, goes well beyond that, and in doing so, threatens the ability of the Executive branch to fulfill its statutory and constitutional obligations. This threat arises, in particular, because the bill would: (1) too narrowly limit who can serve in an "acting" capacity; (2) provide no safety valve for instances in which the bill might interfere with critical duties pertaining to national security, criminal law enforcement, public health and safety, the stability of financial markets, and the oversight of financial institutions; and (3) provide insufficient time to fill positions, especially at the beginning of an Administration.

The Administration understands the Senate's genuine interest in passing legislation in this area and would be willing to support a fair and workable bill. It is troubling, however, that the Senate would so severely restrict the Administration's ability to fill vacant positions and do the people's business while at the same time confirming the President's nominees at an astonishingly slow pace. The Administration simply cannot support a bill that would have such a severe and damaging impact on the Government's ability to function.

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(Do Not Distribute Outside Executive Office of the President)

This Statement of Administration Policy (SAP) was developed by the Legislative Reference Division (Elmore). White House Counsel (Weiner) and White House Legislative Affairs (Ballentine) concur with the position. VAPD (Kogut) and the White House Executive Clerk (Saunders) have no objection. Deputy Director for Management (DeSeve) has no comment.

The Department of Veterans Affairs (Hall) concurs with this position. The following agencies have no objection: the Departments of Justice (Jones), the Treasury (Dorsey), Commerce (Dowell), and the Office of Personnel Management (Wolf), and the Agency for International Development (Miller). The following agencies have no comment: the Departments of Agriculture (Julie) and the Interior (Schwartz), the Corporation for National and Community Service (Sofer), Environmental Protection Agency (Schneider), General Services Administration (Ratchford), National Aeronautics and Space Administration (Jarrel), Office of National Drug Control Policy (Rivait), Small Business Administration (Hontz), and Social Security Administration (Chessier).

OMB/LA Clearance: _____

S. 2176 was introduced on June 16, 1998, and reported by the Senate

Governmental Affairs Committee on July 15, 1998.

Administration Position to Date

On July 28, 1998, the White House Chief of Staff transmitted a letter to Senator Lott stating that the "Administration cannot support S. 2176 in its present form. If the bill is not amended to address the Administration's concerns, the President's senior advisers would recommend that he veto the bill." In addition, several agencies have responded to questions from Senator Glenn regarding the bill's expected effects on their respective agencies. In these letters, the agencies have almost uniformly expressed their strong opposition to the bill and have referred to the senior advisers' veto threat in the Chief of Staff's letter. This SAP is consistent with the position and concerns stated in the July 28th letter.

Summary of S. 2176 (Based on the Committee Report)

S. 2176 would provide that upon the death, resignation, or inability of an Executive agency officer to serve in a position requiring Presidential appointment and Senate confirmation, the first assistant to the officer would become the acting officer, for a period beginning on the date the vacancy occurs and not to exceed 150 days. (Currently, the acting officer may serve for 120 days.) As an alternative to this arrangement, the President would be able to direct that a person who has already received Senate confirmation could be made the acting officer in lieu of the first assistant. The bill also would require that a first assistant who has not received Senate confirmation, but who is nominated to fill the office permanently, could be made the acting officer only if he or she has been the first assistant for at least 180 days in the year preceding the vacancy. If a first or second nominee were withdrawn, or rejected or returned by the Senate, the acting official would be able to serve until 150 days after the withdrawal, rejection, or return of that nomination.

S. 2176 would apply to most vacancies in Senate-confirmed positions in Executive agencies, but there would be a few exceptions. First, those laws that expressly provide that they supersede the Vacancies Act would do so. Second, current laws (numbering approximately 41) that provide for the President or the head of an Executive department to designate an officer to perform the functions and duties of a specified office in an acting capacity would be maintained, as would those statutes that themselves stipulate who shall serve in a specific office in an acting capacity. Statutes that only generally permit agency heads to delegate or reassign duties within their agencies would be specified not to constitute statutes that provide for the temporary filling of particular offices.

S. 2176 contains an enforcement provision that would require that an office be vacant if, 150 days after the vacancy arises, the President has not submitted a nominee to the Senate. In such cases, for offices other than the heads of agencies, the functions and duties specifically to be performed by the vacant office would be required to be performed only by the agency head. Such duties would include duties established by regulation for the office during any part of the 180 days before the vacancy occurred, notwithstanding subsequent regulations that purported to limit those duties. The sanction could be ended if the President were to submit a nominee after the 150-day period, at which time the acting officer could resume service. Actions taken in violation of this vacant office provision would have no effect and could not be ratified by anyone else.

S. 2176 would extend for an additional 90 days the 150-day period for submitting nominations for vacancies that exist when a new President swears or affirms the oath of office as President or that arise in the 60 days thereafter. In addition, the bill would maintain holdover provisions in current law that apply to single-member independent agencies and would exempt members of multi-member independent agencies altogether, as the Vacancies Act does currently.

The bill also would require the heads of Executive agencies to report to the General Accounting Office the existence of vacancies, persons serving in an acting capacity, the names of any nominees, and dates of disposition of such nominees. The Comptroller General then would report to the Congress, the President, and the Office of Personnel Management the existence of any violations of the Vacancies Act.

S. 2176 would apply to any office that becomes vacant after the date of enactment. In addition, it would apply to offices that are vacant on the date of enactment; however, the bill would apply to those offices as though they first became vacant on the date of enactment.

Pay-As-You-Go Scoring

According to VAPD (Kogut), S. 2176 would not affect direct spending and receipts; therefore, it is not subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. CBO concurs.

LEGISLATIVE REFERENCE DIVISION DRAFT
September 23, 1998 - 6:36 p.m.